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No. 07-1529

In the Supreme Court of the United States

JESSE JAY MONTEJO
Petitioner

v.

STATE OF LOUISIANA
Respondent

ON WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Does the rule established by the Court in *Michigan v. Jackson*, 475 U.S. 625 (1986) bar police interrogation when a defendant has not requested counsel or otherwise asserted his right to counsel and has validly waived his right to counsel, but a court has appointed the Indigent Defender Board to represent him?

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STATEMENT OF THE CASE

A. *Facts of the Crime*

On September 5, 2002, Lou Ferrari was murdered in his home in St. Tammany Parish, Louisiana. He was found in the kitchen by his wife, Pat Ferrari. Lou Ferrari had suffered two gunshot wounds, one to the right chest area and one to the right eye. (Testimony of Dr. Michael Difatta, State Court Record at p. 2268 and 2272). The wound to the chest was determined to be a contact wound, meaning the gun was in contact with Mr. Ferrari's body when it was fired. However, the gunshot wound to the chest exited Mr. Ferrari's body and was a non-fatal injury. (Testimony of Dr. Michael Difatta, State Court Record at pp. 2269–2270). The gunshot wound to the right eye resulted in complete destruction of the right eye. The bullet traveled through the eye, then through the right base of the brain, and exited the back of Mr. Ferrari's skull. This gunshot wound was fatal within a matter of seconds. (Testimony of Dr. Michael Difatta, State Court Record at pp. 2272-2273).

The Ferrari family owned and operated a dry-cleaning business for approximately 26 years, with ten stores in the area at the time of Mr. Ferrari's murder. Lou Ferrari's wife, Pat, and son, Louis, worked with him in the business. Petitioner, Jesse Montejo, was an acquaintance/friend of Jerry Moore[1]. Moore had

[1]As a result of his role in the murder of Lou Ferrari, Jerry Moore was charged with and convicted by a jury of second degree murder under Louisiana law. Jerry Moore was not present at the

performed mechanical work on equipment at the Ferrari dry cleaning facilities for a number of years. Montejo befriended Moore, and prior to and at the time of the murder, Moore paid Montejo to drive him to work.

Montejo drove a blue van, which was his mode of transportation in driving Moore. (Testimony of Louis Ferrari, III, State Court Record at pp. 2428). The blue van was apparently quite distinctive, with a "cattle guard" on the front. (Testimony of Stacy Stubbenville, State Court Record at pp. 2438-2439). Neighbors of the Ferraris saw Montejo's blue van in the neighborhood the day before the murder and again at the approximate time of the murder. In fact, the blue van left the scene at a high rate of speed, along with Mr. Ferrari's white Lincoln vehicle, stolen during the course of the robbery.[2] (Testimony of Lawrence Landry, State Court Record at pp. 2453, Joanne Discaro, at pp. 2445, Janice Dow, at pp. 2467).

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time of the murder and did not discharge the weapon. He later identified Montejo as the shooter. Moore was sentenced to life imprisonment without benefit of parole, probation or suspension of sentence. The conviction and sentence of Moore was affirmed by the Louisiana First Circuit Court of Appeal, Docket no. 2006 KA 1979, and the Louisiana Supreme Court denied his writ application.

[2]A third person, Eric Gai, was identified as the other driver leaving the scene. Mr. Gai pled guilty to manslaughter in connection with his role in this murder.

B. Pretrial Interrogations of Montejo

As a result of the information gathered by the police regarding the increasingly hostile relationship between Mr. Ferrari and Jerry Moore, Montejo's relationship with Moore, and the eyewitnesses who placed Montejo at the scene of the murder at the approximate time, Montejo was picked up for questioning.

The police obtained, pursuant to a valid waiver, a videotaped confession from Montejo, which is not at issue herein and was obtained prior to the attachment of his Sixth Amendment right to counsel. As part of his confession, Montejo's repeated rationalization to the police in order to downplay his intent to cause harm to Mr. Ferrari was the claim that the gun used to kill Mr. Ferrari was not brought to the scene by Montejo, but instead found during the burglary by him. It was clear that Montejo, during the videotaped statements, wanted to assist the police in locating the gun, because he believed it would corroborate his lack of intent. During the videotaped statements, Montejo gave several increasingly incriminating statements, but he admitted to shooting Mr. Ferrari in what he described as a botched burglary. He said that Jerry Moore persuaded him to burglarize Mr. Ferrari's home, which he believed would be unoccupied, unlocked and full of money, and he agreed to do it because his rent was due. However, he said he found the victim's gun inside the home and when Mr. Ferrari returned home and surprised him, Montejo hit him in the head with the gun, warned him to stay back, fired a warning shot, and when that failed, shot and killed Mr. Ferrari,

before firing the weapon into the couch to un-cock it and throwing the gun in the lake. (Louisiana Supreme Court opinion, Pet. App. 16a-17a).

On the morning of September 10, 2002, a 72 hour hearing, pursuant to article 230.1 of the Louisiana Code of Criminal Procedure was held. Article 230.1 provides that the sheriff or law enforcement officer having custody of an arrested person shall bring him promptly, and in any case within seventy-two hours from the time of the arrest, before a judge for the purpose of appointment of counsel, and the judge may also determine or review a prior determination of the amount of bail. The minute entry from that 72 hour hearing is included in Petitioner's Appendix D, p. 63a. It shows that the petitioner was present, that no bond was set because the petitioner was being charged with first degree murder, and that the "court ordered the Office of Indigent Defender be appointed to represent the petitioner". No individual attorney was appointed.

Later that morning, the police detectives approached Montejo to ask if he would assist in the search for the gun by accompanying them to the area where he had already told them he threw the gun into the lake. According to the detectives, they asked Montejo if he had obtained counsel, and he told them he had not. Montejo did not testify at the suppression hearing. At trial, he testified for the first time that he told the detectives he thought he had a lawyer appointed.

Although petitioner alleges, citing his own testimony at trial, that he told Detective Hall he had a lawyer appointed to him that morning, petitioner's

testimony directly contradicts the testimony of the officers. Detective Jerry Hall testified that he asked Montejo that morning if he had been contacted by an attorney, to which Montejo responded that he had not. (Testimony of Detective Jerry Hall, Joint Appendix, p. 79). Montejo not only did not tell the officers that counsel had been appointed, but he unequivocally denied having a lawyer when directly asked by Detective Hall. In fact, Montejo told the detectives he just wanted to clear this up and never requested a lawyer. (Testimony of Detective Jerry Hall, Joint Appendix, p. 82).

Montejo was again provided with his *Miranda* rights and again waived such rights before accompanying the detectives to the lake. While in the back of the police vehicle on the way back to the jail, Montejo requested a pad and pen from the detectives and told them he wanted to write something. (Testimony of Det. Jerry Hall, Joint Appendix p. 179). He wrote a letter to the widow of the victim, expressing remorse for the shooting of her husband. This letter was consistent with the videotaped statement in which he claimed that he found the gun while in the home and tried to use it to scare Mr. Ferrari. The substance of the letter is reproduced in footnote 49 of the opinion of the Louisiana Supreme Court, found at pp. 22a-23a of Petitioner's Appendix A.

C. The Trial and Conviction

The overwhelming evidence at trial proved to the jury Montejo's guilt.

In addition to the evidence placing Montejo at the scene of the murder, the investigating officers and crime scene personnel collected fingernail scrapings from Lou Ferrari. Photographs were taken of petitioner, which showed abrasions on his neck. (Testimony of Detective Jerry Hall, State Court Record at pp. 2712-2713). Dr. Sudhir Sinha, an expert in molecular biology and DNA, performed the DNA testing on these scrapings. Dr. Sinha testified that the DNA in the left fingernail scrapings resulted from an intentional scratch and was not the result of minor contact, such as shaking hands. According to Dr. Sinha, there was a high degree of certainty, the chance of a random match being 1 in 163 billion, that the DNA found in the fingernail scrapings from the victim matched petitioner. (Testimony of Dr. Sudhir Sinha, State Court Record at pp. 2623-2632). There was simply no theory of innocence consistent with this powerful forensic finding of an intentional scratch. The only evidence put forth by defendant to explain this DNA evidence was his own self serving testimony.

Once Mr. Ferrari entered his home that afternoon, he had no means of escaping Montejo, intent on getting the money he wanted. The testimony of the Chief Deputy Coroner, Dr. Michael Difatta, established that the gunshot wound to Mr. Ferrari's eye would have resulted in almost instantaneous death, dropping the victim "right there". (Testimony of Dr. Michael Difatta, State Court Record at p. 2273). The crime scene photographs showed the position of Mr. Ferrari, demonstrating that the victim was cornered in the kitchen by Montejo when he was shot and killed.

Petitioner testified at the trial and admitted he was at the Ferrari house when Lou Ferrari was murdered, although he claimed that he was there by virtue of an invitation from Mr. Ferrari (another claim for which there is no evidence). Petitioner claimed at trial that a black male who he could only identify as D.P. was the murderer. However, Montejo had previously confessed in a videotaped interview with police. As the Louisiana Supreme Court noted in its decision, the story he gave at trial was the seventh version of the crime given by Montejo, which was "an elaborated variation" of the fifth version. (Pet. App.18a). Montejo, as detailed below, had an extensive criminal history. During the interrogation, Montejo is clearly a savvy ex-con, who was trying to read the police, attempting to determine how much they knew as he spoke with them. He gave the police bits and pieces of information, which gradually increased until he confessed to shooting Mr. Ferrari. Even then, he tried to minimize his role and intent in the crime. As the Louisiana Supreme Court noted, the jury watched approximately four hours of the videotaped police interrogation of Montejo, "during which Montejo slowly made increasingly incriminating statements until he finally admitted that he shot the victim, who had unexpectedly returned home and interrupted Montejo's burglary." (Pet. App. 9a). Montejo further testified at trial to his extensive criminal history from Florida, with numerous convictions for crimes such as theft, burglary and armed burglary.

The jury found Montejo guilty of first degree murder on March 9, 2005. Following the penalty phase, which was held on March 10, 2005, the jury

determined that Montejo should be sentenced to death. Montejo's conviction and sentence were affirmed by the Louisiana Supreme Court on January 16, 2008, and his request for rehearing was denied on March 7, 2008.

D. The Lower Court Opinions

With respect to the suppression hearing on this issue, the district court relied upon *Moran v. Burbine*, 475 U.S. 412 (1986). The court held that the fact an attorney was appointed did not prevent Montejo from exercising or waiving his rights. Since he had waived his right to counsel, the court denied the motion to suppress the letter at issue. (Joint Appendix 160-162).

Montejo appealed to the Louisiana Supreme Court, alleging numerous assignments of error. With regard to the admission into evidence of the apology letter at issue, the Louisiana Supreme Court relied upon a decision issued by the Fifth Circuit in *Montoya v. Collins*, 955 F.2d 279 (5th Cir. 1992), *cert. denied* 506 U.S. 1036 (1992). Following the reasoning of the United States Court of Appeals for the Fifth Circuit, the Louisiana Supreme Court held that something more than "mute acquiescence" in the appointment of counsel is necessary to trigger the enhanced protection provided by *Michigan v. Jackson, supra*. (Pet. App. 47a). Since defendant did not make a request for counsel, *Michigan v. Jackson* was not applicable, and the introduction of the apology letter into evidence was upheld.

SUMMARY OF ARGUMENT

The apology letter written by Montejo was properly admitted into evidence, because he made a voluntary, knowing and intelligent waiver of his right to counsel before writing the letter.

Montejo did not assert or otherwise invoke his right to counsel, and accordingly, did not trigger the protections of *Michigan v. Jackson*. The attachment of the Sixth Amendment right to counsel should be distinct from the assertion of such right. *Michigan v. Jackson* was premised upon the *request* for counsel by that defendant. In the subsequent decision in *Patterson v. Illinois*, the Court also focused on the lack of a *request* for counsel, noting that defendant had not retained, or accepted by appointment, a lawyer to represent him.

A petitioner should be required to make a clear and unambiguous assertion of his right to counsel, consistent with the requirement in *Edwards v. Arizona*, prior to implementing the harsh consequences of *Michigan v. Jackson*, thereafter barring any police initiated contact with the petitioner. Just as a petitioner is entitled to be informed of his rights, the police are entitled to be adequately informed when a suspect desires to assert his right to counsel.

ARGUMENT

A. An "Assertion" or "Request" for Counsel Is Necessary to Invoke The Constraints of Michigan v. Jackson

1. The voluntary choice of a petitioner to speak with police should not be automatically invalidated without a sufficiently clear assertion of the right to counsel

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence". U.S. Const. amend. VI. The purpose of the Sixth Amendment is to "assure that in any 'criminal prosecution' the accused shall not be left to his own devices in facing the 'prosecutorial forces of organized society'". *Moran v. Burbine*, 475 U.S. at 430.

In *Michigan v. Jackson*, 475 U.S. 625, 636 (1986), this Court held that if police initiate interrogation after a defendant's *assertion*, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid. (Emphasis added.).

Petitioner asserts that the mere appointment of counsel at the 72 hour hearing on September 10 triggered the rule of *Michigan v. Jackson*, and as a result, the apology letter written by Montejo is per se invalid. The effect of petitioner's argument herein would be to invalidate an otherwise voluntary choice to speak with police based upon his claim that the "well

established" rule prohibits subsequent police-initiated custodial questioning once a petitioner "obtains" counsel "even if the petitioner purports to waive his rights". (Pet'r Br. at p. 18). In other words, petitioner's argument does not take into consideration whether or not a petitioner requests counsel, but merely abrogates any choice of a suspect when counsel has been appointed and further signifies that any purported waiver is invalid. The voluntariness of Montejo's waiver given on September 10 is not at issue, but he claims that no waiver could be given. Petitioner's argument is essentially that once a petitioner's Sixth Amendment right to counsel has attached, the rule of *Michigan v. Jackson* applies, even though petitioner has not requested counsel or affirmatively invoked his right to counsel. Petitioner cites *Michigan v. Harvey*, 494 U.S. 344 (1990) (citing *Patterson v. Illinois*, 487 U.S. 385 (1988) and *Michigan v. Jackson*, 475 U.S. 625 (1985) as support for this principle. The State of Louisiana asserts that petitioner's position is contrary to the underlying foundations set forth in this Court's jurisprudence.

In *Michigan v. Jackson,* 475 U.S. at 626, 636, this Court specifically noted the fact that the petitioner "requested" counsel at his arraignment. This Court discussed the rationale of *Edwards v. Arizona*, 451 U.S. 477 (1981), stating that it was "grounded in the understanding that the *assertion* of the right to counsel is a significant event". (Emphasis added.) In this case, Montejo did not make a request or assertion for counsel at the 72 hour hearing. The district court merely appointed the Indigent Defender Board to represent him. In fact, when asked by the detective on the

morning of September 10 if he had obtained counsel, Montejo denied having counsel.

In *Patterson,* 487 U.S. at 290, post-indictment police interrogation was at issue. Although there was no doubt that petitioner was entitled, under the Sixth Amendment, to the assistance of counsel, in footnote 3, the Court noted "as a matter of some significance that petitioner had not retained, or accepted by appointment, a lawyer to represent him". The Court found that the petitioner, "at no time sought to *exercise* his right to have counsel present". (Emphasis added.) The decision in *Michigan v. Jackson* "turned on the fact that the accused had *asked* for the help of a lawyer in dealing with the police". (Emphasis added.) *Patterson*, 487 U.S. at 290-291. While petitioner argues in his brief herein that his silence constituted acceptance of the appointment, such a silence should not be equated with a request or assertion for counsel necessary under *Michigan v. Jackson*. In fact, Montejo was not required to accept such appointment, but could have instead hired a counsel of his own choosing, or under certain circumstances, chosen self-representation.

In *Maine v. Moulton*, 474 U.S. 159, 170-171 (1985), the Court held that once the right to counsel has attached *and* been asserted, the State has an affirmative obligation to respect and preserve the accused's choice to seek such assistance.

Moreover, in *Moran,* 475 U.S. at 430, the Court rejected an argument that the *existence* of an attorney-client relationship somehow triggered the Sixth Amendment right to counsel, noting that the "Sixth Amendment's intended function is not to wrap a protective cloak around the attorney-client relationship

for its own sake any more than it is to protect a suspect from the consequences of his own candor".

The precedent in *Michigan v. Jackson* and its progeny has turned on the *invocation* or *assertion* by a suspect of his Sixth Amendment right to counsel, which is consistent with the principles enunciated by the Court. These principles of protecting an accused's right to counsel are balanced against society's interest in police investigations. *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991). As the Court recognized in *Texas v. Cobb*, 532 U.S. 162, 171-172 (2001), the "Constitution does not negate society's interest in the ability of police to talk to witnesses and suspects". "Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser. Admissions of guilt resulting from valid *Miranda* waivers 'are more than merely 'desirable'; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.' " *Texas v. Cobb,* 532 U.S. at 172, citing *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991) (quoting *Moran v. Burbine*, *supra*.)

In addition to the balancing of an accused's rights and societal interest, another purpose behind the *Michigan v. Jackson* rule is to provide a deterrent to police badgering defendants into waiving the right. *McNeil*, 501 U.S. at 177, *Harvey*, 494 U.S. at 350. The requirement of an assertion of the right by a defendant is essential to both purposes of the *Michigan v. Jackson* rule. Such an affirmative assertion clearly notifies the police of a defendant's election to invoke his right to counsel. It provides a logical and definite line at which the police must stop communication with

a defendant. Yet, it does not inordinately impinge upon the societal interest in obtaining information regarding a crime.

A clear and unequivocal assertion or invocation of the right to counsel should be necessary to invoke the prophylactic rule of *Michigan v. Jackson*, because of the harsh consequences which flow from such rule, consequences which negate or diminish the societal need to convict and punish criminals. This Court has recognized the ability of defendants to waive their Sixth Amendment right to counsel after attachment of the right. In *McNeil,* 501 U.S. at 181, the Court rejected the argument that police were precluded from questioning a defendant once he was formally charged with a crime. The fact that such suspects would be "unapproachable . . . even though they have never expressed any unwillingness to be questioned" was contrary to the societal interest in punishing criminal activity. Such an absolute bar has never been advocated by this Court.

The *Michigan v. Jackson* protections "should apply only where a suspect has made a clear and unambiguous assertion of the right not to speak outside the presence of counsel, the same clear election required under *Edwards. . .* It is quite unremarkable that a suspect might want the assistance of an expert in the law to guide him through hearings and trial, and the attendant complex legal matters that might arise, but nonetheless might choose to give on his own a forthright account of the events that occurred. A court-made rule that prevents a suspect from even making this choice serves little purpose". *Texas v. Cobb,* 532 U.S. at 176 (Kennedy, J., concurring).

In this case, Montejo did not invoke or assert his right to counsel.[3] Although petitioner relies solely upon his own self-serving testimony at trial that he made such a request, the officers who testified at the both the hearing on the motion to suppress and the trial stated that not only did Montejo not request counsel, but he denied having counsel when asked by one of the investigating officers, just prior to the request to accompany the officers to the bridge. Instead, he freely elected to accompany the police, fulfilling his earlier offer to lead them to the murder weapon and attempting to bolster his claims of lack of intent to commit this crime. Under such circumstances, *Michigan v. Jackson* should not prohibit

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[3]On page 31 of Petitioner's Brief, petitioner argues facts which the State submits relate to a separate issue which is not before this Court. Petitioner states that he repeatedly made clear to interrogators that he did not choose to deal with them in the absence of a lawyer. However, as to the first alleged instance of petitioner's statements which he alleges occurred shortly after he was picked up for questioning, the officers testified that he did not request an attorney. (State Court Record at pp. 962-963 and 1022). With respect to the second instance, petitioner asked for an attorney during the videotaped interview. Petitioner alleged his rights were violated by the introduction of such videotaped interview after he asserted those rights. However, the Louisiana Supreme Court found that Detective Morse properly "terminated the interview and scrupulously honored the petitioner's request". The Court further found that the petitioner retracted his request for counsel, re-initiating the discussions with the detectives. He subsequently was found to have freely and voluntarily waived his rights. The admission of the videotaped confession was upheld and is not before this Court. All of these alleged statements by Montejo were made prior to the 72 hour hearing at issue.

the voluntary statements made by Montejo in the letter at issue.

2. The requirement that a petitioner assert his right to counsel does not present new or unworkable procedures

While petitioner argues that the ruling by the Louisiana Supreme Court is unfair and not administrable, it only requires that a petitioner express his desire to exercise his right to counsel in a manner that is sufficiently unambiguous, just as the Court required in *Edwards v. Arizona* for Fifth Amendment purposes. As this Court stated in *Patterson v. Illinois*, 487 U.S. at 296, *Miranda* warnings sufficiently apprise a petitioner of the nature of his Sixth Amendment rights and of the consequences of abandoning those rights. "Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer and that he was aware of the state's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law. . ." *Patterson*, 487 U.S. at 296. The Court further opined that waiver of the Sixth Amendment right should not be more difficult to waive than the Fifth Amendment right, stating "we have never suggested that one right is 'superior' or 'greater' than the other, nor is there any support in our cases for the notion that because a Sixth Amendment right may be involved, it is more difficult to waive than the Fifth Amendment counterpart". *Patterson*, 487 U.S. at 298-300.

A new procedure, as suggested by petitioner, is unnecessary. As set forth by this Court in *Patterson*, 487 U.s. at 296, *Miranda* warnings sufficiently apprise a defendant of his Sixth Amendment right, and the defendant then has the choice whether or not to speak with officers and has the choice whether or not to assert his right to counsel. Contrary to Montejo's assertion, silence of a defendant will not forfeit a constitutional protection. However, silence should not be equated with an outright bar to all police interrogation once counsel is appointed. Such a holding would be contrary to this Court's prior rulings as discussed above.

B. The Introduction of the Apology Letter Constituted Harmless Error

As argued above, the State of Louisiana submits that the state court correctly allowed the introduction into evidence of the letter written by petitioner, which he asserts herein was obtained in violation of his Sixth Amendment rights. However, the State submits that even if any error is found by this Court with the admission of such letter, any such error was harmless in light of the other overwhelming evidence of petitioner's guilt at trial.

This Court has previously held that the admission of a confession alleged to have been obtained in violation of a petitioner's rights is subject to harmless error analysis. *Milton v. Wainwright*, 407 U.S. 371 (1972) and *Arizona v. Fulminante*, 499 U.S. 279 (1991). The only evidence at issue herein alleged to have been obtained in violation of petitioner's Sixth

Amendment right to counsel is the letter which he wrote to the victim's widow on September 10, 2002. The State submits that the verdict rendered herein was certainly not attributable to any error in the introduction of the letter at issue. The jury had before it approximately four hours of videotaped interviews with Montejo, conducted prior to this time, in which Montejo admitted that he shot Mr. Ferrari when he unexpectedly returned home and interrupted Montejo's burglary of the home. The videotaped confession is not at issue in this Petition, and the admission of such videotaped interviews with Montejo were upheld by the state district court and the Louisiana Supreme Court. Moreover, the uncontradicted testimony of the witnesses at trial placed Montejo at the scene of the crime at the approximate time of the murder, DNA evidence matching petitioner was found under the fingernails of the victim, and photographs taken of petitioner shortly after his arrest shows abrasions on his neck consistent with scratches. The Louisiana Supreme Court noted in its decision the testimony of Dr. Sinha, an expert in molecular biology and DNA analysis, who testified at the trial and "concluded that the victim intentionally scratched petitioner because sample characteristics ruled out DNA transfer by coincidental contact". (Pet. App. 5a).

In addition, the very letter at issue in this appeal which petitioner seeks to exclude from evidence would have nonetheless been available as impeachment evidence, because petitioner testified at the trial of this matter. In *Michigan v. Harvey,* 494 U.S. at 353, this Court held that the prosecution may use a statement taken in violation of the *Jackson*

prophylactic rule to impeach a petitioner's false or inconsistent testimony. Accordingly, had Montejo not admitted to the contents of such letter, the State would have been allowed to use the letter for impeachment purposes.

In the event this Court finds that the letter written by Montejo should have been excluded from evidence, the case should be remanded for a determination of whether such error was harmless.

CONCLUSION

For the foregoing reasons, the State of Louisiana submits that the judgment of the Louisiana Supreme Court should be affirmed.

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